Nos. 14-556, 14-562, 14-571 and 14-574

Supreme Court, U.S.
FILED
MAR 6 - 2015
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

JAMES OBERGEFELL, *et al.*
AND BRITTANI HENRY, *et al.*,

Petitioners,

v.

RICHARD HODGES, DIRECTOR, OHIO DEPARTMENT OF HEALTH, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF *AMICUS CURIAE* OF LEGAL SCHOLARS STEPHEN CLARK, ANDREW KOPPELMAN, SANFORD LEVINSON, IRINA MANTA, ERIN SHELEY AND ILYA SOMIN

ANDREW KOPPELMAN
NORTHWESTERN UNIVERSITY
SCHOOL OF LAW
375 East Chicago Avenue
Chicago, Illinois 60611
(312) 503-8431

ILYA SOMIN
GEORGE MASON UNIVERSITY
SCHOOL OF LAW
3301 Fairfax Drive
Arlington, Virginia 22201
(703) 993-8069

JOSEPH P. LOMBARDO
Counsel of Record
ERIC S. SILVESTRI
BRITTANY L. VIOLA
SARA T. GHADIRI
CHAPMAN AND CUTLER LLP
111 West Monroe Street
Chicago, Illinois 60603
(312) 845-3000
lombardo@chapman.com

QUESTION PRESENTED

Should state laws that restrict marriage rights based on sex be subject to the same heightened scrutiny that is imposed on all other sex-discriminatory legislation?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF CITED AUTHORITIES iv

IDENTITY AND INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

Laws That Deny Same-Sex Couples the Right to Marry Classify on the Basis of Sex and Are Therefore Subject to Intermediate Scrutiny 4

A. Laws that Forbid Same-Sex Marriage Classify on the Basis of Sex. 4

B. There Is No Lowered Level of Scrutiny for Symmetrical Discrimination That Imposes Burdens on Both Sexes. 9

C. A Challenge to a Sex-Discriminatory Statute Need Not Prove That the Statute's Purpose Is to Subordinate Women or to Express Hostility to Either Gender, as Such 15

Table of Contents

Page

Laws That Ban Same-Sex Marriage Are Often Based on Impermissible Gender Stereotypes 18

Marriage Laws That Discriminate on the Basis of Gender Go Against the Original Meaning of the Fourteenth Amendment 23

Lower Courts Have Defied the Authority of the Court Under the Guise of Deferring to It 29

CONCLUSION 32

TABLE OF CITED AUTHORITIES

Page

Cases

Andersen v. King Cnty.,
138 P. 3d 963 (Wash. 2006) 9, 10

Baehr v. Lewin,
852 P. 2d 44 (Haw. 1993) 9, 10

Baker v. Nelson,
191 N.W. 2d 185 (Minn. 1971) 10

Baker v. Nelson,
409 U.S. 810 (1971) 3, 10, 20

Baker v. State,
744 A. 2d 864 (Vt. 1999).....9, 10, 13

Bassett v. Snyder,
951 F. Supp. 2d 939 (E.D. Mich. 2013) 15

Bishop v. U.S. ex rel. Holder,
962 F. Supp. 2d 1252 (N.D. Okla. 2014) 15

Bradwell v. Illinois,
83 U.S. (16 Wall.) 130 (1872) 27, 28

Brause v. Bureau of Vital Statistics,
No. 3AN-95-6562 CI, 1998 WL 88743
(Alaska Super. Ct. Feb. 27, 1998).....9

Cited Authorities

Page

Brown v. Bd. of Educ.,
347 U.S. 483 (1954) 6, 12, 18, 25

Cleburne v. Cleburne Living Ctr.,
473 U.S. 432 (1985) 5

Conaway v. Deane,
932 A. 2d 571 (Md. 2007) 10

Conde-Vidal v. Garcia-Padilla,
No. 14–1253 (PG), 2014 WL 5361987
(D.P.R. Oct. 21, 2014) 30

Craig v. Boren,
429 U.S. 190 (1976) 2, 5, 16, 28, 29, 31

Dean v. Dist. of Columbia,
653 A. 2d 307 (D.C. App. 1995) 10

DeBoer v. Snyder,
772 F. 3d 388 (6th Cir. 2014) 15, 19, 24, 29

Frontiero v. Richardson,
411 U.S. 677 (1973) 6, 7, 20

Geiger v. Kitzhaber,
994 F. Supp. 2d 1128 (D. Or. 2014) 10

Glossip v. Mo. Dep't. of Transp. & Highway Patrol Emps.'s Ret. Sys.,
411 S.W. 3d 796 (Mo. 2013) 11

Cited Authorities

Page

Goesaert v. Cleary,
335 U.S. 464 (1948) 30

Goodridge v. Dep't of Pub. Health,
798 N.E. 2d 941 (Mass. 2003) 9

Hernandez v. Robles,
855 N.E. 2d 1 (N.Y. 2006) 9, 10

Hollingsworth v. Perry,
133 S. Ct. 2652 (2013) 10

In re Kandu,
315 B.R. 123 (Bankr. W.D. Wash. 2004) 10

In re Marriage Cases,
183 P. 3d 384 (Cal. 2008) 10

J.E.B. v. Alabama ex rel. T.B.,
511 U.S. 127 (1994) 20, 28

Jackson v. Abercrombie,
884 F. Supp. 2d 1065 (D. Haw. 2012) 10

Jones v. Commonwealth,
80 Va. 538 (Va. Ct. App. 1885) 6

Kitchen v. Herbert,
961 F. Supp. 2d 1181 (D. Utah 2013) 9

Cited Authorities

Page

L.A. Dept. of Water & Power v. Manhart,
435 U.S. 702 (1978) 7, 8, 14

Latta v. Otter,
19 F. Supp. 3d 1054 (D. Idaho 2014) 10

Latta v. Otter,
771 F. 3d 456 (9th Cir. 2014) 9, 10, 13, 14, 21

Lawrence v. Texas,
539 U.S. 558 (2003) 15, 23

Lawson v. Kelly,
14–0622–CV–W–ODS, 2014 WL 5810215
(W.Mo. Nov. 7, 2014) 4, 9

Loving v. Virginia,
388 U.S. 1 (1967) 17, 28

McLaughlin v. Florida,
379 U.S. 184 (1964) 6, 11, 12, 13, 17

Miss. Univ. for Women v. Hogan,
458 U.S. 718 (1982) 5, 16, 18, 20

Nev. Dep't. of Human Res. v. Hibbs,
538 U.S. 721 (2003) 21

Newport News Shipbuilding & Dry Dock Co. v. E.E.O.C.,
462 U.S. 669 (1983) 8

Cited Authorities

Page

Pace v. Alabama,
106 U.S. 583 (1883) 11, 12, 13

Perez v. Lippold,
198 P. 2d 17 (Cal. 1948) 14

Perry v. Schwarzenegger,
704 F. Supp. 2d 921 (N.D. Cal. 2010) 9

Phillips v. Wis. Pers. Comm'n,
482 N.W. 2d 121 (Wis. Ct. App. 1992) 10

Plessy v. Ferguson,
163 U.S. 537 (1896) 18

Price Waterhouse v. Hopkins,
490 U.S. 228 (1989) 8

Richmond v. J.A. Croson Co.,
488 U.S. 469 (1989) 17

Rodriguez de Quijas v. Shearson/Am. Express, Inc.,
490 U.S. 477 (1989) 30

Sevcik v. Sandoval,
911 F. Supp. 2d 996 (D. Nev. 2012) 10

Singer v. Hara,
522 P. 2d 1187 (Wash. App. 1974) 10

Page

Smelt v. Cnty. of Orange,
374 F. Supp. 2d 861 (C.D. Cal. 2005) 10

State v. Walsh,
713 S.W. 2d 508 (Mo. 1986) 10, 11, 12, 13

Terveer v. Billington,
34 F. Supp. 3d 100 (D.D.C. 2014).....9

United States v. Virginia,
518 U.S. 515 (1996) 3, 5, 6, 20, 28

United States v. Windsor,
133 S. Ct. 2675 (2013).....23

Weinberger v. Wiesenfeld,
420 U.S. 636 (1975).....7, 16

Wengler v. Druggists Mut. Ins. Co.,
446 U.S. 142 (1980)..... 15-16

Wilson v. Ake,
354 F. Supp. 2d 1298 (M.D. Fla. 2005).....10

Wolf v. Walker,
986 F. Supp. 2d 982 (W.D. Wis. 2014).....22

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. XIV, § 1.....4

Cited Authorities

Page

STATUTES

Mo. Rev. Stat. § 566.090.1(3) (West 1986).....11, 12

Ohio Const. art. XV, § 11 (West 2014).....7

OTHER AUTHORITIES

Amicus Br. of Catholic Conference of Ohio, *Henry v. Himes*, No. 14-3464, 2014 WL 2916640 (6th Cir. June 17, 2014).....20

Amicus Br. of Citizens for Comty. Values, *Obergefell v. Himes*, No. 14-3057, 2014 WL 1653834 (6th Cir. Apr. 17, 2014) 19-20

Balkin, Jack L., *Framework Originalism and the Living Constitution*, 103 NW. U. L. Rev. 549 (2009) 24

Barnett, Randy E., *Underlying Principles*, 24 Const. Comment. 405 (2007).....24

Black, Jr., Charles L., *The Lawfulness of the Segregation Decisions*, 69 Yale L.J. 421 (1960).....21

Bork, Robert H., The Tempting of America: The Political Seduction of the Law (1990).....25

Cited Authorities

Page

Calabresi Steven G. & Andrea Matthews, *Originalism and Loving v. Virginia*, 2012 BYU L. Rev. 1393 (2012).....26

Calabresi, Steven G. & Livia Fine, *Two Cheers for Professor Balkin's Originalism*, 103 Nw. U. L. Rev. 663 (2009).....24

Calabresi, Steven G. & Julia Rickert, *Originalism and Sex Discrimination*, 90 Tex. L. Rev. 1 (2011).....26

Clark, Stephen, *Same-Sex but Equal: Reformulating the Miscegenation Analogy*, 34 Rutgers L.J. 107 (2002).....13, 14, 15

Eskridge, Jr., William N. & Darren R. Spedale, Gay Marriage: For Better or For Worse? What We've Learned from the Evidence (2006).....19, 27

Harrison, John, *Reconstructing the Privileges or Immunities Clause*, 101 Yale L.J. 1385 (1992).....25

Koppelman, Andrew, *Judging the Case Against Same-Sex Marriage*, 2014 Ill. L. Rev. 431 23

Koppelman, Andrew, *More Intuition than Argument (Review of Sherif Girgis, Ryan T. Anderson, & Robert P. George*, What is Marriage? Man and Woman: A Defense (2012)), 140 Commonweal, May 3, 2013.....23

Page

Koppelman, Andrew, ***Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination***, 69 N.Y.U. L. Rev. 197 (1994) 15

Merriam-Webster's Collegiate Dictionary 556 (10th ed. 1994).....21

Rappaport, Mike, ***Between the Original Decision and Abstract Originalism: An Unbiased Approach to Original Meaning***, Libr. L. & Liberty (Dec. 8, 2014) 24

Saunders, Melissa L., ***Equal Protection, Class Legislation, and Colorblindness***, 96 Mich. L. Rev. 245 (1997).....26

Skidmore, W. Christopher et al., ***Gender Nonconformity and Psychological Distress in Lesbians and Gay Men***, 35 Archives Sexual Behav. 685 (2006).....22

Slawson, W. David, ***Developments in the Law, Employment Discrimination and Title VII of the Civil Rights Act of 1964***, 84 Harv. L. Rev. 1109 (1971) 7

Somin, Ilya, ***How to Figure Out When Laws Banning Same-Sex Marriage Became Unconstitutional, and Why the Precise Date May Not Matter***, Volokh Conspiracy, (Mar. 26, 2013, 11:44 PM) 28

Cited Authorities

Page

Transcript of Oral Argument at 12-14, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12-144) 30

Upham, David R., *Interracial Marriage and the Original Understanding of the Privileges or Immunities Clause*, 42 Hastings Const. L.Q. 213 (2015) 26

Widiss, Deborah A. et al., *Exposing Sex Stereotypes in Recent Same-Sex Marriage Jurisprudence*, 30 Harv. J.L. & Gender 461 (2007) 19

IDENTITY AND INTEREST OF AMICUS CURIAE

Amici are legal scholars who teach and write in the field of constitutional law, and who each have studied, written scholarly commentary on, or have a professional interest in one of the issues presented in these cases: Should state laws that restrict marriage rights based on sex be subject to the same heightened scrutiny that is imposed on all other sex-discriminatory legislation?

Amici are the following legal scholars:[1]

Stephen Clark, Professor of Law at Albany Law School;

Andrew Koppelman, John Paul Stevens Professor of Law at Northwestern University School of Law;

Sanford Levinson, W. St. John Garwood and W. St. John Garwood, Jr. Centennial Chair in Law at the University of Texas at Austin School of Law;

Irina Manta, Associate Professor of Law and Director of the Center for Intellectual Property Law at the Maurice A. Deane School of Law at Hofstra University;

---

1. Pursuant to this Court's Rule 37.3(a)„ all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, *amici* affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission. *Amici* appear in their individual capacities; institutional affiliations are listed here for identification purposes only.

Erin Sheley, Adjunct Professor at George Washington University.

Ilya Somin, Professor of Law at George Mason University School of Law.

SUMMARY OF ARGUMENT

If April DeBoer were a man, or James Obergefell a woman, or Valeria Tanco a man, or Greg Bourke a woman, then state law would readily give them the relief they seek. But because the state laws challenged in these cases provide that only a man can marry a woman and only a woman can marry a man – or that existing marriages will be denied recognition if they do not fit this description – April and James and Valeria and Greg are being discriminated against on the basis of their sex. Such gender-based classifications constitute sex discrimination. Accordingly, they must be subjected to intermediate scrutiny. *See Craig v. Boren*, 429 U.S. 190, 197 (1976).

Some lower courts have resisted the application of heightened scrutiny to laws banning same-sex marriage by importing into the equal protection analysis elements that do not belong there: either a rule that "separate but equal" does not violate equal protection, or a rule that sex classifications are permissible unless the challenger shows that it was adopted for the purpose of subordinating women. Neither of these theories has ever been adopted by the Court. Both would license dangerous results, and both are inconsistent with well-settled precedent.

Moreover, laws banning same-sex marriage are in part based on "overbroad generalizations about the

different talents, capacities, or preferences of males and females" of a kind that the Equal Protection Clause seeks to combat. *United States v. Virginia*, 518 U.S. 515, 533 (1996). These generalizations are in significant part motivated by efforts to enforce stereotypical, traditional gender roles, even if that motivation is not present on the part of all supporters of these laws. Thus, laws banning same-sex marriage must be invalidated not only to protect against formal sex discrimination, but also to prevent states from adopting laws based on overbroad stereotypes about abilities and social roles of both men and women.

Marriage laws discriminating on the basis of sex are also inconsistent with the original meaning of the Fourteenth Amendment, which forbids such discrimination unless it can be justified by a state interest unrelated to class discrimination and justified by relevant factual evidence. Today, our understanding of same-sex relationships is far more advanced than in the nineteenth century, and the application of the Amendment's original principles must take account of that increased knowledge.

Finally, some lower federal courts have purported to defer to *Baker v. Nelson*, a 1972 decision that summarily dismissed a same-sex marriage claim as raising no substantial federal question. 409 U.S. 810 (1972). That result, however, predated the rule that sex-based classifications are subject to heightened scrutiny. Some lower courts that reject claims for same-sex marriage have cited *Baker* as an excuse for ignoring the plainly applicable rule established by the Court's later decisions. This "solution" is a creative, but abusive, version of deference. Only this Court can overrule its own precedents. But when it lays down a rule that is inconsistent with previous

decisions, that newer, more up-to-date rule must be followed in preference to earlier decisions that might go against it.

ARGUMENT

Laws That Deny Same-Sex Couples the Right to Marry Classify on the Basis of Sex and Are Therefore Subject to Intermediate Scrutiny.

A. Laws that Forbid Same-Sex Marriage Classify on the Basis of Sex.

Each of the laws challenged in this case clearly mandates that whether one can marry any specific person depends on whether one is a man or a woman. As a recent district court decision striking down a similar Missouri law explains, "[t]he State's 'permission to marry' depends on the gender of the would-be participants. The State would permit Jack and Jill to be married but not Jack and John. Why? Because in the latter example, the person Jack wishes to marry is male. The State's permission to marry depends on the genders of the participants, so the restriction is a gender-based classification." *Lawson v. Kelly*, 14–0622–CV–W–ODS, 2014 WL 5810215, at *8 (W.D. Mo. Nov. 7, 2014).

The Equal Protection Clause requires that "[n]o State shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. This Court has interpreted that provision as prohibiting arbitrary discrimination, or treating similar things dissimilarly. In ordinary cases, this analysis produces a very deferential standard of judicial review. *See, e.g.*,

Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985) ("The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest."). But laws that classify based on "race, alienage, or national origin ... are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest." *Id.* While almost any legislation can meet the deferential "minimal scrutiny" test, which asks merely whether the statute is rationally related to a legitimate state interest, very few laws have been able to satisfy the heightened "strict scrutiny" test.

Classifications based on sex or illegitimacy are subject to a third, intermediate level of scrutiny. "[S]tatutory classifications that distinguish between males and females" are presumptively invalid, and thus, to overcome this barrier, must be "substantially related" to the achievement of "important governmental objectives." *See Craig*, 429 U.S. at 197. "[T]he party seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of showing an 'exceedingly persuasive justification' for the classification." *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982); *see also U.S. v. Virginia*, 518 U.S. at 531. "The burden of justification is demanding and it rests entirely on the State." *U.S. v. Virginia*, 518 U.S. at 533.

A classification is based on trait "T" if it requires state officials, in allocating rights and burdens, to determine in specific cases whether T is present. Legal consequences turn on the presence or absence of T. That is what it means to classify.

For example, in *Brown v. Board of Education*, the state had to determine the race of students in order to decide to which public schools to assign them. 347 U.S. 483 (1954); *see also U.S. v. Virginia*, 518 U.S. at 533. That is how we know that the state was using a race-based classification. The same rule determined the outcome in *McLaughlin v. Florida*, in which the Court unanimously invalidated a criminal statute prohibiting an unmarried interracial couple from habitually living in and occupying the same room at night. 379 U.S. 184 (1964); *see also U.S. v. Virginia*, 518 U.S. at 533. "It is readily apparent," wrote Justice White for the Court, that the statute in question "treats the interracial couple made up of a white person and a Negro differently than it does any other couple." *Id.* at 188. In fact, the race of the defendant was an essential element of the crime that the prosecution must prove. *See id.* at 184. *Cf. Jones v. Commonwealth*, 80 Va. 538, 542 (Va. Ct. App. 1885) ("To be a negro is not a crime; to marry a white woman is not a crime; but to be a negro, and being a negro, to marry a white woman is a felony; therefore, it is essential to the crime that the accused shall be a negro – unless he is a negro he is guilty of no offense."). Justice Stewart, concurring, declared that "it is simply not possible for a state law to be valid under our Constitution which makes the criminality of an act depend upon the race of the actor." *McLaughlin*, 379 U.S. at 198 (Stewart, J., concurring).

The same principle applies in cases involving sex discrimination. The Equal Protection Clause requires "skeptical scrutiny of official action denying rights or opportunities based on sex." *U.S. v. Virginia*, 518 U.S. at 531. The decision in *Frontiero v. Richardson* invalidated a law that automatically allowed male members of the Air Force to claim their wives as dependents and therefore

receive housing and medical benefits, but required female members to prove that their husbands depended on them for more than half their financial support. 411 U.S. 677, 680 (1973). If Sharron Frontiero had been male, she would have received the benefits she claimed. *Id.* at 678-79. In order to determine her rights, the Air Force had to determine whether she was male or female. Thus, the law denying her benefits was invalidated because it discriminated on the basis of sex. Likewise, the Court, in *Weinberger v. Wiesenfeld*, struck down a provision of the Social Security Act that allowed a widowed mother – but not a widowed father – to receive survivor's benefits based on the earnings of the deceased spouse. 420 U.S. 636, 653 (1975). If Stephen Wiesenfeld had been female, he would have received the benefits he was denied. *Id.* at 640-41. Once more, in order to determine a litigant's legal rights administrators had to determine whether he was male or female. The Court later endorsed a "simple test" for assessing whether sex discrimination is present: "whether the evidence shows 'treatment of a person in a manner which but for that person's sex would be different.'" *L.A. Dept. of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978) (quoting W. David Slawson, *Developments in the Law, Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 Harv. L. Rev. 1109, 1170 (1971)).

The discrimination at issue in the present case is obviously sex discrimination in exactly the same way. All of the challenged laws require that the state first determine the sex of the persons wishing to marry before determining whether they will be allowed to marry the partner of their choice. *See, e.g.*, Ohio Const. art. XV, § 11 (West 2014) ("Only a union between one man and one woman may be a marriage valid in or recognized by this

state and its political subdivisions."). Put simply, if Ann is permitted to marry Bob, but Charles may not marry Bob, then Charles is being discriminated against on the basis of sex because he is being treated "in a manner which but for [his] sex would be different." *Manhart*, 435 U.S. at 711 (internal quotation marks omitted). Thus, the law that mandates this different treatment discriminates by sex.[2]

Indeed, laws banning same-sex marriage classify on the basis of sex more clearly than those laws discriminate on the basis of sexual orientation, as such orientation has no direct effect on the way the law operates. Ann is still allowed to marry Bob, even if one of them happens to be gay or lesbian; but Charles is specifically denied that right regardless of his sexual orientation. As Justice Johnson

---

2. This Court has also had occasion to elaborate the concept of an injury being "based" on gender under Title VII of the Civil Rights Act of 1964. There, the most restrictive view of causation among the Members of this Court has been the "but-for" test. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 281-86, 262-63 (1989) (Kennedy, J., dissenting) (O'Connor, J., concurring in the judgment). Such concepts as "because of," "based on," and "on the basis of" were there regarded as "synonymous with but-for causation." *Id.* at 282 (Kennedy, J., dissenting). "[S]ex is a cause ... whenever, either by itself or in combination with other factors, it made a difference to the decision." *Id.* at 284 (Kennedy, J. dissenting). The question is whether a person has been treated "in a manner which but-for that person's sex would be different." *Newport News Shipbuilding & Dry Dock Co. v. E.E.O.C.*, 462 U.S. 669, 683 (1983). Under this "but-for" test, Michigan's refusal to allow April DeBoer to marry Jayne Rowse constitutes a gender-based state action. If DeBoer's gender were male instead of female, the outcome in applying Michigan's marriage laws to her quest to marry Rowse would be different. If DeBoer were a man, Michigan would allow that very marriage.

of the Vermont Supreme Court has stated, "[a] woman is denied the right to marry another woman because her would-be partner is a woman, not because one or both are lesbians .... [S]exual orientation does not appear as a qualification for marriage" under laws banning same-sex marriage; but sex does. *Baker v. State*, 744 A.2d 864, 905 (Vt. 1999) (Johnson, J., concurring in part and dissenting in part). The laws at issue in this case plainly discriminate based on sex. Thus, intermediate scrutiny should apply.

B. There Is No Lowered Level of Scrutiny for Symmetrical Discrimination That Imposes Burdens on Both Sexes.

Some judges have accepted the sex discrimination rationale for striking down laws banning same-sex marriage,[3] but many more have rejected it. The argument is often advanced that there is no sex-based classification

---

3. *Latta v. Otter*, 771 F.3d 456, 480-96 (9th Cir. 2014) (Berzon, J., concurring); *Perry v. Schwarzenegger*, 704 F.Supp.2d 921, 996 (N.D. Cal. 2010); *Lawson v. Kelly*, 14–0622–CV–W–ODS, 2014 WL 5810215, at *8 (W.D. Mo. Nov. 7, 2014); *Kitchen v. Herbert*, 961 F.Supp.2d 1181, 1206 (D. Utah 2013) (dictum); *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 CI, 1998 WL 88743, at *6 (Alaska Super. Ct. Feb. 27, 1998); *Baehr v. Lewin*, 852 P.2d 44, 64-67 (Haw. 1993) (plurality opinion); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 971-73 (Mass. 2003) (Greaney, J., concurring); *Hernandez v. Robles*, 855 N.E.2d 1, 29-30 (N.Y. 2006) (Kaye, C.J., dissenting); *Baker v. State*, 744 A.2d 864, 905-07 (Vt. 1999) (Johnson, J., concurring in part and dissenting in part); *Andersen v. King Cnty.*, 138 P.3d 963, 1037-39 (Wash. 2006) (en banc) (Bridge, J., concurring in dissent); *see also Terveer v. Billington*, 34 F.Supp.3d 100, 115 (D.D.C. 2014) (holding that discrimination against gay employee may be based on nonconformity with sex stereotypes).

in these cases, because persons of both sexes are equally forbidden to marry a person of the same sex.[4] In other words, since the gender-based burden is symmetrical, it is supposedly not a form of sex discrimination. Sex discrimination challenges to the Defense of Marriage Act (later invalidated on other grounds by the Court) were often rejected on the same basis.[5]

The leading decision in which this fallacy was used to uphold a law that discriminated on the basis of sex is *State v. Walsh*. 713 S.W.2d 508 (Mo. 1986) (en banc), *abrogated*

---

4. *Latta v. Otter*, 19 F.Supp.3d 1054, 1074 (D. Idaho 2014), *rev'd on other grounds by Latta*, 771 F.3d 456; *Geiger v. Kitzhaber*, 994 F.Supp.2d 1128, 1139-40 (D. Or. 2014); *Sevcik v. Sandoval*, 911 F.Supp.2d 996, 1005 (D. Nev. 2012) *rev'd on other grounds by Latta*, 771 F.3d 456; *Jackson v. Abercrombie*, 884 F.Supp.2d 1065, 1098 (D. Haw. 2012) *vacated as moot by Jackson v. Abercrombie*, 585 Fed. App'x 413 (9th Cir. 2014); *In re Marriage Cases*, 183 P.3d 384, 436 (Cal. 2008), *aff'd on other grounds, sub nom by Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013); *Dean v. Dist. of Columbia*, 653 A.2d 307, 363 n.2 (D.C. App. 1995) (op. of Steadman, J.); *Baehr*, 852 P.2d at 71 (Heen, J., dissenting); *Conaway v. Deane*, 932 A.2d 571, 597-98 (Md. 2007); *Hernandez*, 855 N.E.2d at 10-11; *Baker*, 744 A.2d at 880 n.13; *Andersen*, 138 P.3d at 988 (en banc); *Phillips v. Wis. Pers. Comm'n*, 482 N.W.2d 121, 127-28 (Wis. Ct. App. 1992); *see also Baker v. Nelson*, 191 N.W.2d 185, 187 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1971); *Singer v. Hara*, 522 P.2d 1187, 1191-92 (Wash. App. 1974).

5. *See, e.g., Smelt v. Cnty. of Orange*, 374 F.Supp.2d 861, 877 (C.D. Cal. 2005), *aff'd in part, vacated in part and remanded with directions to dismiss for lack of standing*, 447 F.3d 673 (9th Cir. 2006) ("DOMA does not treat men and women differently."); *Wilson v. Ake*, 354 F.Supp.2d 1298, 1307-08 (M.D. Fla. 2005) (same); *In re Kandu*, 315 B.R. 123, 143 (Bankr. W.D. Wash. 2004) (same).

by Glossip v. Mo. Dep't. of Transp. & Highway Patrol Emps.'s Ret. Sys., 411 S.W.3d 796 (Mo. 2013) (en banc). In *Walsh*, the Supreme Court of Missouri reversed a lower court's declaration that a statute prohibiting "deviate sexual intercourse with another person of the same sex," Mo. Rev. Stat. § 566.090.1(3) (West 1986), deprived the defendant of equal protection because "'the statute would not be applicable to the defendant if he were a female.'" *Walsh*, 713 S.W.2d at 509 (quoting unpublished trial court opinion). More specifically, the court stated:

> The State concedes that the statute prohibits men from doing what women may do, namely, engage in sexual activity with men. However, the State argues that it likewise prohibits women from doing something which men can do: engage in sexual activity with women. We believe it applies equally to men and women because it prohibits both classes from engaging in sexual activity with members of their own sex. Thus, there is no denial of equal protection on that basis.

Id. at 510.

The Missouri court's logic mimics that of *Pace v. Alabama*, the notorious 1883 decision in which this Court for the first time considered the constitutionality of anti-miscegenation laws. 106 U.S. 583 (1883), *overruled in part by McLaughlin*, 379 U.S. 184 (1964). The statute at issue in *Pace* prescribed penalties for interracial sex that were more severe than those imposed for adultery or fornication between persons of the same race. The Court unanimously rejected the equal protection challenge to the statute, denying that it discriminated on the basis of race:

> [The section prohibiting interracial sex] prescribes a punishment for an offence which can only be committed where the two sexes are of different races. There is in neither section any discrimination against either race .... Whatever discrimination is made in the punishment prescribed in the two sections is directed against the offence designated and not against the person of any particular color or race. The punishment of each offending person, whether white or black, is the same.

Id. at 585.

The reasoning in *Walsh* is identical to that of *Pace*. Like Alabama's anti-miscegenation law, the Missouri statute "prescribe[d] a punishment for an offence which can only be committed where the two [participants] are of [the same sex]," and it too was directed "against the [activity] designated and not against the person of any particular [sex]." *Compare id. with* Mo. Rev. Stat. § 566.090.1(3) (West 1986)

But *Pace* is no longer good law. It was repudiated by the Court in the next miscegenation case it considered, *McLaughlin v. Florida*. *See McLaughlin*, 379 U.S. 184. In the wake of the unanimous decision condemning segregated public schools in *Brown v. Board of Education*, the *McLaughlin* Court – also unanimously – invalidated a criminal statute prohibiting an unmarried interracial couple from habitually living in and occupying the same room at night. In response to the state's reliance on *Pace*, the Court declared that *Pace* represented "a limited view of the Equal Protection Clause which has not withstood

analysis in the subsequent decisions of this Court." *McLaughlin*, 379 U.S. at 188. Since the State had failed to establish that the statute served "some overriding statutory purpose requiring the proscription of the specified conduct when engaged in by a white person and a Negro, but not otherwise," the statute necessarily fell as "an invidious discrimination forbidden by the Equal Protection Clause." *Id.* at 192-93.

Imagine a different, equally symmetrical statute, forbidding persons of both sexes to perform a job traditionally performed by the other sex. *See* Stephen Clark, *Same-Sex but Equal: Reformulating the Miscegenation Analogy* 34 Rutgers L.J. 107, 143 (2002). Here is another: "a statute that required courts to give custody of male children to fathers and female children to mothers." *Baker*, 744 A.2d at 906 n.10 (Johnson, J., concurring in part and dissenting in part). Judge Berzon of the Ninth Circuit has noted that "[s]urely, a law providing that women may enter into business contracts only with other women would classify on the basis of gender. And that would be so whether or not men were similarly restricted to entering into business relationships only with other men." *Latta v. Otter*, 771 F.3d 456, 481 (9th Cir. 2014) (Berzon, J., concurring).

Under the logic of the symmetry argument of *Pace* and *Walsh*, none of these laws impose sex-based classifications. As Professor Stephen Clark has observed:

> The semantic trick is simply to avoid talking about the sex-based differential in concrete terms of what opportunities women and men are allowed and, instead, to embed that very

> differential in the supposed single standard, which is recast as a uniformly applicable formula that allocates opportunities to "everyone" by making everyone's opportunities turn, in the but-for sense, on what their sex happens to be.

Clark, *supra* p. 13, at 144.[6]

Even if the burdens imposed on both sexes as a group are in some sense equal and symmetrical, this does not render them nondiscriminatory or exempt them from heightened scrutiny. Despite "the absence of a discriminatory effect on women as a class" or on men as a class, laws that classify on the basis of gender are subject to heightened scrutiny if they "discriminate against *individual[s]* ... because of their sex." *Manhart*, 435 U.S. at 716 (emphasis added). And there can be no doubt that laws banning same-sex marriage "limit[] the affected individuals' opportunities based on their sex." *Latta*, 771 F.3d at 481 (Berzon, J., concurring).

---

6. Clark concedes that "separate but equal" burdens have implicitly been accepted in some sex discrimination cases, but only where the burden is a trivial one, such as a requirement that men and women use separate toilets. It will not work here unless it can be shown that the partner you want is fungible with the partner that the state wants you to have. *See* Clark, *supra* p. 13, at 174-84. What the California Supreme Court has said about race is equally applicable here: "A member of any of these races may find himself barred by law from marrying the person of his choice and that person to him may be irreplaceable. Human beings are bereft of worth and dignity by a doctrine that would make them as interchangeable as trains." *Perez v. Lippold*, 198 P.2d 17, 25 (Cal. 1948) (en banc).

C. A Challenge to a Sex-Discriminatory Statute Need Not Prove That the Statute's Purpose Is to Subordinate Women or to Express Hostility to Either Gender, as Such.

The sex discrimination argument has also been challenged by claims that sex-based classifications are permissible unless the plaintiff shows that they were adopted with the purpose of subordinating women or expressing hostility to a particular gender. *See, e.g., Bishop v. U.S. ex rel. Holder*, 962 F. Supp.2d 1252, 1286 (N.D. Okla. 2014); *Bassett v. Snyder*, 951 F.Supp.2d 939, 961 (E.D. Mich. 2013), *rev'd by DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014); *Cf.* Clark, *supra* p. 13, at 147-53 (discussing this argument).[7] This theory flatly misrepresents the law. The Court has never required a litigant challenging a sex-based classification to show that the statute promotes the subordination of women, reinforces sexism, or is somehow motivated by hostility to either men or women as a class. Even if a law "discriminates against both men and women" on the basis of their gender, it is still subject to heightened scrutiny. *Wengler v. Druggists Mut. Ins. Co.*,

---

7. Justice Scalia advanced a similar argument in his response to the sex discrimination argument in *Lawrence v. Texas*. 539 U.S. at 599-600 (Scalia, J., dissenting). Justice Scalia is right that a discriminatory purpose is necessary to invalidate "a facially neutral law that makes no mention of race." *Id.* at 600. But this does not distinguish the miscegenation laws, which were not facially neutral. Sex-based restrictions on the right to marry are not facially neutral either.

If the challengers had this burden in the present case, they would be able to satisfy it. *See infra*, Part II; *see also* Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. Rev. 197, 234-273 (1994).

446 U.S. 142, 147-49 (1980). Once a sex-based classification is present, the law is presumed to be unconstitutional, and the burden shifts to the state to rebut that presumption by showing that the classification is substantially related to the achievement of important government objectives. *See Craig*, 429 U.S. at 197-98.

In *Craig v. Boren*, the case that first announced that sex-based classifications would be subject to heightened scrutiny, the Court invalidated a law that prohibited the sale of 3.2% beer to males under the age of 21 and females under the age of 18. *Id.* at 190-94. The Court did not hold that the classification at issue tended to subordinate either men or women, nor did it hold that male 18-to-20-year-old beer drinkers had been subjected to a history of discrimination. Indeed, it is highly unlikely that the Oklahoma state legislature of the 1970s was motivated by hostility to males, or a desire to subordinate men. The Court nonetheless held that the state had not met the heavy burden of justification for the classification.

Indeed, both *Craig* and several other early decisions in which the Court invalidated sex-discriminatory laws involved policies that discriminate against men rather than women – enacted at a time when men clearly had greater political influence than women did, and it is highly unlikely that the challenged policies were motivated by animus against men as a class. *See, e.g., Hogan*, 458 U.S. at 724-29 (striking down state nursing school policy restricting admission to women only); *Weinberger*, 420 U.S. at 640-53 (striking down law that treated female widows more favorably than male widowers).

Similarly, the Court does not require a party challenging a racially discriminatory statute to show any connection between the statute and racism. A party need not show that the statute's enactment was motivated by racism or that it has the effect of reinforcing racism. *See, e.g., Richmond v. J.A. Croson Co.*, 488 U.S. 469, 495-96 (1989) (rejecting arguments for the application of "a less exacting standard [of scrutiny] to 'benign' racial classifications"). Equal protection doctrine does not require claimants to address such complex sociological questions. Rather, the challenger only has to show that there is a classification of a kind that is subject to heightened scrutiny. If such a classification is present, the burden then shifts to the state to show sufficient justification for the law.[8]

A rule like the one adopted by some lower courts in same-sex marriage cases – that a sex-based classification is valid so long as it does not reinforce sexism – would be a drastic innovation. Were the Court to endorse it, the consequences would reach far beyond this case. It would

---

8. The analogy between sex discrimination cases and miscegenation cases has confused some commentators, because they assume that the Court's holding in *Loving v. Virginia*, which invalidated laws against interracial marriage, depended on its finding that such laws endorsed the doctrine of "White Supremacy." 388 U.S. 1, 12 (1967). But *Loving* was not the first case in which the Court invalidated a miscegenation law. It was preceded by *McLaughlin*, in which the Court did not say a word about white supremacy; addressing the question of the law's relation to racism was not necessary to the decision. In fact, *Loving* is the *only* Supreme Court decision that has ever directly relied on the idea of white supremacy as a basis for invalidating a law that explicitly discriminates on the basis of race.

work a dangerous revolution in sex discrimination law, and in practice severely undermine the nondiscrimination requirement. How often could a plaintiff challenging a law possibly make such a contestable showing to the satisfaction of a skeptical court? The rule would invite judges to make their own judgments about the motives behind gender classifications, and those inclined to uphold such laws would tend to attribute benign purposes to them.[9]

Laws That Ban Same-Sex Marriage Are Often Based on Impermissible Gender Stereotypes.

Laws that ban same-sex marriage not only discriminate on the basis of sex, but often do so in part for reasons motivated by gender stereotypes of a kind the Court has long rejected as a permissible basis for legislation. "[T]he test for determining the validity of a gender-based classification ... must be applied free of fixed notions concerning the roles and abilities of males and females." *Hogan*, 458 U.S. at 724-25. Unfortunately, many of the justifications offered in defense of laws banning same-sex marriage make extensive use of exactly the sorts of "fixed notions" about appropriate gender roles that the Court rejects. While not all opposition to same-sex marriage is based on endorsement of rigid gender roles or other forms of sexism, such assumptions do underpin many of the most common justifications for laws banning it.

---

9. The classic example of such creative judicial reinterpretation of a statute is *Plessy v. Ferguson*, 163 U.S. 537, 552 (1896), *overruled by Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (if "the enforced separation of the two races stamps the colored race with a badge of inferiority ... it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it").

In the present case, at least one of the state defendants has argued that marriage must be restricted to opposite-sex couples because the presence of both male and female parents is essential to providing an optimal environment for raising children. *See DeBoer v. Snyder*, 973 F.Supp.2d 757, 770-73 (E.D. Mich. 2014), *rev'd* 772 F.3d 388 (6th Cir. 2014). This argument is a clear example "of fixed notions concerning the roles and abilities of males and females" with respect to raising children, especially since the notions in question are not even well-supported by the available empirical evidence. *See* William N. Eskridge, Jr. & Darren R. Spedale, Gay Marriage: For Better or For Worse? What We've Learned from the Evidence (2006) (reviewing relevant social scientific evidence and concluding it does not support claims that opposite-sex couples are superior at child-raising).

Courts rejecting the sex discrimination arguments have often relied on sex-based stereotypes to justify the denial of marriage to same-sex couples: that men and women provide distinct role models for children, that the two sexes have complementary roles in marriage, and that marriage is a remedy for male irresponsibility. *See* Deborah A. Widiss, et al., *Exposing Sex Stereotypes in Recent Same-Sex Marriage Jurisprudence*, 30 Harv. J.L. & Gender 461 (2007) (providing extensive documentation of these stereotypes). In fact, such claims were put forward by some the states' *amici* in the cases currently before the Court. One contends that gender-discriminatory marriage laws are necessary to "encouraging men to commit to the mothers of their children and jointly raise the children they beget," which implies that men as a group are likely to be irresponsible, whereas women are not. Amicus Br. of Citizens for Comty. Values, at 25, *Obergefell v. Himes*, No.

14-3057, 2014 WL 1653834, at *15 (6th Cir. Apr. 17, 2014). Another claims that such laws are essential to ensure that boys have a "proper male role model," thereby assuming that the "proper" role models for boys are male. Amicus Br. of Catholic Conference of Ohio, at 15, *Henry v. Himes*, No. 14-3464, 2014 WL 2916640, at *9 (6th Cir. June 17, 2014). Even in cases where such gender-based stereotypes enjoy "some statistical support," laws based on them are still presumptively invalid and subject to heightened scrutiny. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 139 n.11 (1994). Far from justifying a lower level of judicial scrutiny, these are the very kind of illicit motives that intermediate scrutiny tries to detect. *See U.S. v. Virginia*, 518 U.S. at 535-36 (noting that heightened scrutiny of gender classifications is necessary to ensure that "benign justifications proffered in defense of categorical exclusions will not be accepted automatically," but must instead be scrutinized as part of an inquiry into "actual state purposes").

In determining whether a sex-based classification serves important governmental objectives, "[c]are must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions." *Hogan*, 458 U.S. at 725. The "archaic and stereotypic notions" that the Court has forbidden are often identified as being inaccurate empirical generalizations about women. *See, e.g., id.* at 725-26; *see also Frontiero v. Richardson*, 411 U.S. 677, 686-87 (1973) (plurality opinion). But such impermissible notions also include the normative notion that men and women should not act in ways that are believed to be unseemly for their sex. For this reason, the Court has consistently struck down statutes whose purpose was the imposition of traditional gender roles.

Laws based on "pervasive sex-role stereotype[s]" about the social behavior of men and women violate the Fourteenth Amendment. *Nev. Dep't. of Human Res. v. Hibbs*, 538 U.S. 721, 731 (2003); *cf. Latta*, 771 F.3d at 486 (Berzon, J., concurring) (noting that "hostility toward nonconformance with gender stereotypes also constitutes impermissible gender discrimination" and citing relevant cases). The demand that women marry only men imposes precisely such roles. It is based in part on longstanding stereotypes about the relative roles and abilities of men and women with respect to child-raising and the family – stereotypes evident in some of the arguments advanced in the very case currently before the Court.

To the extent that laws banning same-sex marriage are motivated by rejection of homosexuality, that purpose is also often closely tied to sex discrimination and the subordination of women. This connection is a matter "not so much for judicial notice as for the background knowledge of educated men who live in the world." Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 Yale L.J. 421, 426 (1960). Indeed, homosexuality is itself *defined* by reference to gender. Merriam-Webster's Collegiate Dictionary 556 (10th ed. 1994) (defining *homosexual* as "of, relating to, or characterized by a tendency to direct sexual desire toward another of the same *sex*" and "of, relating to, or involving sexual intercourse between persons of the same *sex*" (emphases added)).

The link between prejudice against gays and lesbians and sexism is common knowledge, if anything is. At least until recently, most Americans learned no later than high school that one of the nastier social sanctions that one will suffer if one deviates from the behavior traditionally

deemed appropriate to one's sex is the imputation of homosexuality. It is an obvious cultural fact that the stigmatization of homosexuality is closely linked to gays' and lesbians' supposed deviation from the roles traditionally deemed appropriate to persons of their sex. While not all hostility to homosexuality can be attributed to prejudice against perceived gender-nonconformity, such motives are often a major factor. *See, e.g.*, W. Christopher Skidmore, et al., *Gender Nonconformity and Psychological Distress in Lesbians and Gay Men*, 35 Archives Sexual Behav. 685, 686-87 (2006) (noting evidence that prejudice against gays and lesbians is often linked to hostility towards gender nonconformity, and finding that lesbians and gay men who exhibit more such nonconformity are subject to greater stigma than those who exhibit it less).

Moreover, the stigmatization of both lesbians and gay men often takes gender-specific forms that imply that men ought to dominate women. While gay men are stigmatized as "effeminate," *i.e.*, insufficiently aggressive and dominant, lesbians are stigmatized as *too* aggressive and dominant, and are thereby seen as guilty of a kind of gender insubordination. The two stigmas – sex-inappropriateness and homosexuality – are often virtually interchangeable. Each is readily used as a metaphor for the other. Much of the resistance to same-sex marriage is likewise parasitic on a gendered conception of marriage in which men and women have distinct and complementary roles, with male dominance a part of the model.

Some lower courts have portrayed the sex discrimination argument as "counterintuitive and legalistic." *Wolf v. Walker*, 986 F.Supp.2d 982, 1008 (W.D. Wis. 2014). Such claims are puzzling. Most laws that

discriminate against gay people inevitably classify on the basis of sex. Until recently, some sodomy laws, such as the one at issue in *Lawrence v. Texas*, criminalized some conduct for one sex but not for the other. 539 U.S. 558 (2003). Moreover, many such laws – including laws banning same-sex marriage – are based on gender-role stereotypes. It is hard to understand how this aggressive policing of gender boundaries can be portrayed as having no connection with sex discrimination.[10]

Marriage Laws That Discriminate on the Basis of Gender Go Against the Original Meaning of the Fourteenth Amendment.

Laws restricting the right to marry on the basis of gender go against not only this Court's precedents requiring intermediate scrutiny of laws that discriminate on the basis of sex, but also the original meaning of the

---

10. In his dissenting opinion in *United States v. Windsor*, Justice Alito wrote that supporters of same-sex marriage advocate "a particular understanding of marriage under which the sex of the partners makes no difference." 133 S.Ct. 2675, 2711 (2013). He thus acknowledged the sex-based character of the law, but argued that a legislature could rationally hold that "marriage is essentially the solemnizing of a comprehensive, exclusive, permanent union that is intrinsically ordered to producing new life, even if it does not always do so." *See id.* at 2718. Even if a statute based on that view of marriage can pass minimal rational basis scrutiny, it is too doubtful and contested to satisfy intermediate scrutiny. *See* Andrew Koppelman, *More Intuition than Argument (Review of Sherif Girgis, Ryan T. Anderson, & Robert P. George*, What is Marriage? Man and Woman: A Defense (2012)), 140 Commonweal, May 3, 2013 https://www.commonwealmagazine.org/more-intuition-argument; Andrew Koppelman, *Judging the Case Against Same-Sex Marriage*, 2014 Ill. L. Rev. 431.

Fourteenth Amendment. The Sixth Circuit decision under review in the present case claims that such laws are consistent with the original meaning, because few if any observers in 1868 would have thought otherwise. *DeBoer*, 772 F.3d at 403-04, *cert. granted* No. 14–571 2015 WL 213650 (Jan. 16, 2015). But, as most originalists recognize today, the original expected applications of the framers are distinct from the original understanding of the meaning of the text.[11] Only the latter is controlling law.

All legal decision-making necessarily involves the application of general rules to specific facts. Even if the rules are unchanging, facts are not. Many important provisions of the Constitution establish broad, general principles that must be applied to factual conditions that can change over time. This is particularly true of the Equal Protection Clause, the Privileges or Immunities Clause, and other broadly worded provisions of the Fourteenth Amendment.

Our understanding of the relevant facts inevitably evolves, as new evidence accumulates. For example, the leading originalist Judge Robert Bork famously argued that the original meaning of the Fourteenth Amendment

---

11. *See, e.g.*, Jack L. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. Rev. 549, 552 (2009); Randy E. Barnett, *Underlying Principles*, 24 Const. Comment. 405 (2007); Steven G. Calabresi & Livia Fine, *Two Cheers for Professor Balkin's Originalism*, 103 Nw. U. L. Rev. 663, 668-71 (2009); Mike Rappaport, *Between the Original Decision and Abstract Originalism: An Unbiased Approach to Original Meaning*, Liberty Law Blog (Dec. 8, 2014), http://www.libertylawsite.org/liberty-forum/between-the-original-decision-and-abstract-originalism-an-unbiased-approach-to-original-meaning/.

justified striking down racially segregated education in 1954, even if that result may not have been expected by most of those who ratified the Amendment in 1868. Although "[t]he ratifiers probably assumed that segregation was consistent with equality" between the races, "[b]y 1954 ... it had been apparent for some time that segregation rarely if ever produced equality." Robert H. Bork, The Tempting of America: The Political Seduction of the Law 82 (1990). Thus, the Court was justified in concluding in *Brown v. Board of Education* that invalidating laws mandating racial segregation in education was the only way to vindicate the original meaning, which required racial equality under the law. *Id.* Judge Bork recognized that changes in factual understanding between 1868 and 1954 provided an originalist justification for striking down laws that most Americans in 1868 might have believed to be constitutional, based on the knowledge they had (or thought they had) at the time.[12]

Similarly, the drafters and ratifiers of the Amendment believed that many forms of sex discrimination were compatible with the Amendment's general ban on "class" and "caste" discrimination. Senator Jacob Howard, one of the leading drafters of the Amendment, avowed that its purpose was to "abolish[] all class legislation in the States." John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 Yale L.J. 1385, 1413 (1992)

---

12. Judge Bork's argument is not cited here as the only possible originalist rationale for *Brown v. Board of Education*, or even the best possible one. Rather, it stands as a powerful illustration of the principle that changing factual knowledge can justify changing enforcement of the principles of the Fourteenth Amendment, sometimes in ways unanticipated by the framers and ratifiers in 1868.

(quoting Sen. Howard); *cf.* Melissa L. Saunders, *Equal Protection, Class Legislation, and Colorblindness*, 96 Mich. L. Rev. 245 (1997) (describing the nature and scope of this general principle of the Amendment).[13] Class-based discrimination with respect to the right to marry was considered particularly suspect, because that right was viewed as a fundamental element of the rights of free citizens. Recent scholarship shows that leading supporters of the Amendment believed that it invalidated laws banning interracial marriage for precisely this reason. *See* Steven G. Calabresi & Andrea Matthews, *Originalism and Loving v. Virginia*, 2012 BYU L. Rev. 1393 (2012) (providing extensive evidence documenting this view of marriage); David R. Upham, *Interracial Marriage and the Original Understanding of the Privileges or Immunities Clause*, 42 Hastings Const. L.Q. 213 (2015) (same).

It was widely recognized that men and women, like blacks and whites, were distinct "classes" covered by the Amendment. *Cf.* Calabresi & Rickert, *supra* p. 26, at 20-24 (citing many examples of such recognition). But it was also generally believed in 1868 that most laws discriminating on the basis of gender did not violate constitutional rights against class legislation, because they were based on genuine, "natural" differences between the abilities of

---

13. For present purposes, the Court need not address the difficult issue of whether this principle is embedded in the Equal Protection Clause, the Privileges or Immunities Clause, or some combination of both. *See* Steven G. Calabresi & Julia Rickert, *Originalism and Sex Discrimination*, 90 Tex. L. Rev. 1, 51-58 (2011) (reviewing the possible options, and emphasizing that courts need not choose between them to conclude that the Amendment bars sex discrimination).

men and women, rather than arbitrary generalizations unsupported by evidence. *Id.* In *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1872), one of the earliest Supreme Court cases dealing with sex discrimination, none of the justices denied that sex discrimination fell within the scope of the Amendment. But Justice Bradley nonetheless concluded that a law barring women from admission to the legal profession was constitutional because it was based on "nature, reason, and experience" and "the peculiar characteristics, destiny, and mission of woman." *Id.* at 142 (Bradley, J., concurring). If the available evidence about the "peculiar characteristics" and abilities of women had been different, so too might the outcome of the case.

Just as most Americans in 1868 assumed that the exclusion of women from many professions was justified by "natural" differences between their abilities and those of men, so they also assumed that inherent differences between the sexes ensured that only opposite-sex relationships could carry out the social functions of marriage, such as child-raising, channeling sexual desire, and strengthening social bonds. But just as we now recognize that many nineteenth century beliefs about the abilities of women in professional settings are unsound, the same is true of nineteenth century assumptions about gender roles within marriage. Today, overwhelming evidence indicates that same-sex marriages are capable of carrying out the major social purposes of opposite-sex marriages, including raising children and strengthening social ties. *See, e.g.*, William N. Eskridge, Jr. & Darren R. Spedale, Gay Marriage: For Better or For Worse? What We've Learned from the Evidence (2006) (reviewing the available social scientific evidence). In order to justify striking down laws banning same-sex marriage, we need

not identify exactly when the accumulation of evidence became great enough to be decisive, only that it reached that point at some time before the present case came before the court. *See* Ilya Somin, *How to Figure Out When Laws Banning Same-Sex Marriage Became Unconstitutional, and Why the Precise Date May Not Matter*, Volokh Conspiracy, (Mar. 26, 2013, 11:44 PM), http://volokh.com/2013/03/26/how-to-figure-out-when-laws-banning-same-sex-marriage-became-unconstitutional-and-why-the-precise-date-may-not-matter/.

Even if same-sex relationships, on average, achieve some state interests less effectively than opposite-sex ones, that is still not equivalent to a categorical inability to serve those purposes, of the sort most assumed to exist in 1868. Similarly, even if it could be proven that women, on average, make less capable lawyers than men or that interracial marriages are on average less successful than same-race ones, that would not be enough to establish an originalist justification for resuscitating *Bradwell v. Illinois*, or overruling *Loving v. Virginia*. Even statistically accurate "estimates of what is appropriate for *most* women, no longer justify denying opportunity to women whose talent and capacity place them outside the average description." *U.S. v. Virginia*, 518 U.S. at 517. Similarly, even statistically accurate generalizations about "most" same-sex couples do not justify categorical sex discrimination in marriage laws. "[G]ender classifications that rest on impermissible stereotypes violate the Equal Protection Clause, even when some statistical support can be conjured up for the generalization." *J.E.B. v. Alabama ex. rel. T.B.*, 511 U.S. 127, 140 n.11 (1994). In *Craig v. Boren*, the case that established heightened intermediate scrutiny for sex classifications, the Court invalidated a

law that restricted beer purchases by 18-20 year old men without imposing a similar restriction on women, despite the fact that the state presented "a variety of statistical surveys" indicating that men of that age were far more likely to drink and drive than women. *Craig*, 429 U.S. at 200-02.

As long as they respect other relevant constitutional rights, states may use gender-neutral mechanisms to screen out couples deemed unsuitable for raising children or for advancing other state interests. But they may not use generalizations to categorically assume that one set of couples defined by gender are inherently unfit, especially if they simultaneously allow opposite-sex couples access to marriage with little or no screening to determine whether they are likely to do a good job of raising children or carrying out other social functions. Michigan, Ohio, and other states that forbid same-sex marriage on the basis that it facilitates child-raising or channels potentially reproductive sexual urges do not also deny marriage rights to opposite-sex couples that are unlikely to be fit parents, or unlikely to have children out of wedlock if unable to marry.

Lower Courts Have Defied the Authority of the Court Under the Guise of Deferring to It.

Some lower federal courts, including the Sixth Circuit ruling under review in the present case, have purported to defer to *Baker v. Nelson*, a 1972 decision of the Court summarily dismissing a same-sex marriage claim as raising no substantial federal question. *See, e.g., DeBoer*, 772 F.3d at 399-402. This is a creative, but abusive, deployment of deference, clinging to an obviously

obsolete decision because the Court has not yet expressly overruled it.

In *Baker*, the Court "dismissed for want of a substantial federal question" an appeal from a state court decision denying same-sex couples the right to marry. 409 U.S. 810 (1972). That decision, however, predated the rule that sex-based classifications are subject to heightened scrutiny. At that time, as Justice Ginsburg recently noted, the Court had not yet decided that heightened scrutiny was appropriate for sex-based classifications. Transcript of Oral Argument at 12-14, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12-144). Yet some recent lower court decisions have ignored this later authority, citing the Court's declaration that when its precedent "has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989), *cited with approval in Conde-Vidal v. Garcia-Padilla*, No. 14–1253 (PG), 2014 WL 5361987, at *5 (D.P.R. Oct. 21, 2014).

Such circumspection on the part of lower courts is appropriate if the Supreme Court has only implicitly embraced reasoning that appears to undermine a settled rule. It is not defensible if the Court has explicitly *announced* a new rule that supersedes the old one.

In *Goesaert v. Cleary*, the Court upheld a statute that barred women from being bartenders unless their husband or father owned the bar. 335 U.S. 464 (1948). No statute of precisely that description has come before

the Court since it announced that sex discrimination is presumptively unconstitutional. A footnote in *Craig v. Boren* specifically disapproved of *Goesaert*. 429 U.S. at 210 n.23. Had that footnote been omitted, and a similar statute were enacted today, should a federal court today decline to apply heightened scrutiny? Obviously not.

Thus, lower courts' reliance on *Baker* defies settled Supreme Court precedent.

CONCLUSION

The laws banning same-sex marriage at issue in this case explicitly discriminate on the basis of sex. Further, many such bans are predicated on improper gender stereotypes, and are also contrary to the original meaning of the Fourteenth Amendment. Accordingly, the Court should apply in this case the same heightened scrutiny it has applied to every other sex-based or gender-stereotyped classification that has come before it.

Respectfully submitted,

ANDREW KOPPELMAN
NORTHWESTERN UNIVERSITY
SCHOOL OF LAW
375 East Chicago Avenue
Chicago, Illinois 60611
(312) 503-8431

ILYA SOMIN
GEORGE MASON UNIVERSITY
SCHOOL OF LAW
3301 Fairfax Drive
Arlington, Virginia 22201
(703) 993-8069

JOSEPH P. LOMBARDO
Counsel of Record
ERIC S. SILVESTRI
BRITTANY L. VIOLA
SARA T. GHADIRI
CHAPMAN AND CUTLER LLP
111 West Monroe Street
Chicago, Illinois 60603
(312) 845-3000
lombardo@chapman.com